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DECISION



THE COMPTROLLER GENERAL
OF THE UNITED STATES
WASHINGTON, D.C. 20548

E. P. ...
Proc I.

FILE: B-189264

DATE: October 28, 1977

MATTER OF: G & H Aircraft

DIGEST:

1. Rejection of low bid for failure to acknowledge material amendment to solicitation is proper, although bidder never received amendment, since failure to receive amendment was not result of conscious and deliberate effort by contracting agency to exclude bidder from competition.
2. Contracting agency is not insurer of delivery of procurement documents to prospective bidders. Bidder, not agency, bears risk of nonreceipt of amendments to solicitation.
3. Amendment imposing additional liability and costs on bidder which were not contained in original solicitation constitutes material change. Failure to acknowledge amendment therefore cannot be waived and bid must be rejected as nonresponsive to amended solicitation.

The Department of Agriculture, Forest Service (Forest Service), has requested an advance decision concerning the award of an indefinite quantities contract to provide light aircraft transportation and reconnaissance services, resulting from invitation for bids (IFB) No. R5-77-37, issued by the Forest Service on March 21, 1977. The Forest Service asks whether the apparent low bid was properly rejected as nonresponsive because the bidder failed to acknowledge an amendment to the solicitation.

Three amendments were issued prior to bid opening. The initial amendment, issued on March 29, 1977, changed the type of service, hourly standby rate, aircraft inspection cost provisions, and measurement of standby time, and advised as follows:

"OFFERORS ARE REQUIRED TO ACKNOWLEDGE RECEIPT OF THIS AMENDMENT PRIOR TO BID OPENING. IF YOU FAIL TO DO SO, YOUR BID WILL BE CONSIDERED NONRESPONSIVE AND WILL NOT BE CONSIDERED FOR AWARD." (Emphasis added.)

A second amendment, effective April 1, 1977, added two items to the

schedule of work, but required acknowledgement only if the bidder submitted a bid on the newly added items. On April 4, 1977, the third amendment, which deleted an item from the schedule, was issued; no acknowledgement was required.

The Forest Service received 25 bids at the bid opening on April 12, 1977. G & H Aircraft (G & H) was the apparent low bidder on items Nos. 1 & 2 (Transport - El Monte Airport), and Executive Aviation was the second low bidder on these items. However, by letter dated April 29, 1977, the Forest Service notified G & H that its bid was nonresponsive and could not be considered for award because the firm failed to acknowledge receipt of an amendment to the IFB. Although the amendment was initially erroneously referred to as amendment No. 2 (April 1, 1977), the amendment in question is, in fact, amendment No. 1 (March 29, 1977).

G & H protested the rejection of its bid by letter to the Forest Service dated May 2, 1977, on the grounds that the firm was the low bidder and could not acknowledge the amendment because no amendments had been received to date. The Forest Service denied the protest by letter to G & H dated May 10, 1977, which states, in pertinent part, as follows:

"Our records show that Solicitation R5-77-37 and each Amendment thereto were mailed to G & H Aircraft. We are not obligated to nor do we use Certified or Registered mail for such mailings, therefore we have no way of knowing if the Amendments were lost in the mail."

In this regard, we have held, concerning the failure to receive an amendment, that the procuring activity is not an insurer of delivery of bidding documents to prospective bidders. The bidder bears the risk of nonreceipt of solicitations and amendments. 52 Comp. Gen. 281, 283 (1972); A. Brindis Company, Inc., B-187041, December 9, 1976, 76-2 CPD 477.

The general rule regarding the effect of a bidder's failure to acknowledge an amendment to an IFB is that such failure cannot be waived if the amendment affects the price, quantity, quality or delivery of the procurement in other than a "trivial or negligible" manner. Federal Procurement Regulations § 1-2.405(d)(2) (1964 ed. circ. 1); Mills Manufacturing Corporation, B-188672, June 15, 1977, 77-1 CPD 430.

Thus, the initial issue for resolution is whether the March 29 amendment included any material change. Changes effected by the amendment concerning the type of service, standby rate, and standby time measurement appear to decrease the scope of work required. Because the decreased work would presumably result in a reduction in the bid price and since G & H was already low, we cannot conclude that these changes would affect

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the price of the procurement in "other than a "trivial or negligible" manner. The amendment, however, also modifies the aircraft inspection cost provision, article 311, to reduce the Government's liability and costs. This change is material and, absent acknowledgement of the amendment, the protester would not otherwise be bound to assume the additional responsibility and resultant costs of inspection which were not imposed by the original solicitation. Mills Manufacturing Corporation, supra.

If a bidder fails to receive and acknowledge a material amendment to a solicitation, the bid must be rejected as nonresponsive unless failure to do so is the result of a conscious and deliberate effort by the contracting agency to exclude the bidder from participating in the competition. 40 Comp. Gen. 126, 128 (1960); Torotron Corporation, B-182418, January 30, 1975, 75-1 CPD 69; Porter Contracting Company, 55 Comp. Gen. 615, 616 (1976), 76-1 CPD 2. Based on the record, we have no reason to believe that G & H failed to receive the amendments due to any deliberate effort on the part of the Forest Service to exclude the firm from competition.

For the aforementioned reasons, we conclude that the G & H bid was properly rejected as nonresponsive.


Acting Comptroller General
of the United States